Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1979

No. 79-1946

JAMES MORAN,

Petitioner,

vs.

GOULD CORPORATION and NATIONAL LABOR RELATIONS BOARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES

JAMES MORAN,

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v.

GOULD CORPORATION and NATIONAL LABOR RELATIONS BOARD,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Petitioner, James Moran, by his counsel, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on February 25, 1980.

Opinion of the Court Below

Copies of the Court of Appeals' Opinion and subsequent Amendment to the Opinion are appended hereto as Appendices A and B, respectively.

Jurisdiction

The Judgment of the Court of Appeals was entered on February 25, 1980. A Petition for Rehearing En Banc was denied on March 14, 1980. Copies of each of the above are attached in Appendix C. The jurisdiction of this Court in invoked pursuant to 28 U.S.C. §1254(1).

Question Presented

Was the substantial evidence standard of review of NLRB factual determinations erroneously modified or grossly misapplied by the court of appeals?

Constitutional and Statutory Provisions

United States Code, Title 29, §158(a)(4).

> "It shall be an unfair labor practice for an employer --
>
> * * *
>
> to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter."

Statement of the Case

On October 13, 1976, there was a spontaneous interruption of work at the Gould Corporation plant in Philadelphia prompted by the company's late response to a union grievance (later won by the union) about use of non-bargaining unit employees. According to the testimony of the company's foreman on the shop floor, this interruption consisted of spontaneous complaints by employees for about two hours, during which 20% to 40% of the employees did not work while company and union officials attempted to resolve the problem. App. 320a-21a. There was no production loss (App. 92a-97a),[1/] things returned to nor-

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1. The appropriate company official was asked to state in concrete terms what, if
(footnote cont. next page)

mal after the company made a commitment concerning bargaining unit workers.

One employee, Petitioner, was disciplined. Although Petitioner arrived after the disturbance started and, as the union steward, expressed the views of the members and attempted to resolve the matter,[2/] he was fired, allegedly for participating in a work stoppage.

Plaintiff filed a complaint with the National Labor Relations Board [hereinafter "NLRB" or "Board"] claiming he was fired for his union status and activity and because he had filed complaints to the Board,

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(footnote cont. from preceding page)
any, loss the company incurred, but neither that official nor any other witness provided any evidence of a concrete loss. The timekeeper testified that production "was not much different than any other night." App. 138a. The employees, who were paid on a bonus system, apparently made up for the minor loss of work time.

2. On the other hand, as the discontent was brewing, the company's foreman on the floor hid in his office, hoping the dispute would just go away instead of discussing it with the employees and Petitioner. He testified, "I guess I didn't have the nerve at that point." App. 325a.

the Equal Employment Opportunity Commission and the Occupational Safety and Health Administration. An Administrative Law Judge of the Board ordered Petitioner reinstated with full back pay, finding his discharge in violation of §§8(a)(1),(3) and (4) of the National Labor Relations Act [hereinafter "the Act"]. On August 25, 1978, the Board affirmed the violation of §8(a)(3) by a vote of 3 to 2 and the violation of §8(a)(4) by a vote of 4 to 1.

The Board's findings were based on quite unusual evidence: the company put in writing both its animus against Petitioner based on his protected activity and the direct relationship of that animus to his discharge. Specifically, the Board's findings were based on the following:

1. A letter dated February 18, 1976 from the company to the union showing company animus against Moran based on his role as a steward and his filing of complaints with federal agencies. App. 409a-11a. This letter lists five actions by Moran that are termed "entirely inappropriate"; three of the five actions specified were:[3/]

(footnote on following page)

"3. In June 1975, Mr. Moran notified the Occupational Health and Safety Administration officers of an alleged health violation. . . .

"4. In August 1975, Mr. Moran filed a charge with the National Labor Relations Board that he was laid off improperly. . . .

"5. In May 1975, Mr. Moran filed a charge with the E.E.O.C. on behalf of an employee whom he represented alleging sex discrimination. . . ." App. 410a.

A copy of this letter is attached hereto in Appendix D.

2. The company's minutes of the fourth step grievance procedure meeting indicating that the February 18, 1976 letter was used by the company to justify the discharge of Moran. App. 412a-13a. Those minutes state:

"After thorough review and discussion, the Company advised the Union that in light of Mr. Moran's actions and statements on the evening of October 13, 1976, which were contrary to the obligations of a Shop

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3. The other two concerned an alleged work stoppage in 1973, about which the company had not brought any disciplinary charges, and an alleged use of company time to prepare grievances.

> Steward and, in view of his past actions as an employee and Shop Steward which indicate repeated violations of the Collective Bargaining Agreement, other agreements, and Company Policy, the Company feels that the discharge in this case was entirely justified. (The Company also outlined Mr. Moran's past violations of the Agreement as a Shop Steward which were discussed in a letter to the Union dated February 18, 1976, copy attached, as well as Mr. Moran's record as an employee.) Therefore, the Company sustains its position and the discharge will stand." App. 413a.

A copy of these minutes is attached hereto in Appendix D. The union's minutes of this meeting agree. App. 417a-20a, 113a, 163a.

3. An internal progress report of the company indicating that Petitioner was alone selected for discipline from among the many employees allegedly involved because of his "past actions as an employee and a shop steward" (App. 416a), which the Board interpreted to refer to his complaints to federal agencies.

4. Petitioner was the only employee disciplined at all, and the company discharged him rather than seeking a lesser punishment even though the interruption of

work started before he arrived and was, at most, minor and short-lived.

The court of appeals overturned the Board's order, largely focussing on the §8(a)(3) claim.[4/] In a paragraph at the end of the opinion (Appendix A, at 12), the court dismissed the Board's ruling on the §8(a)(4) violation by essentially rejecting the Board's partial or mixed motivation standard.

Petitioner sought a rehearing en banc on the panel's rejection of the partial motivation standard, and the panel then amended its opinion, changing the legal standard and reaffirming the Third Circuit's earlier cases on partial motivation. Appendix B, at 1-2. However, the court did not modify its result -- the Board's findings and Petitioner's claim were rejected, without explanation, by simply saying "we conclude that there is no sub-

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4. The Board had held 3-2, that singling out the steward was a per se violation of §8(a)(3). This new rule was the subject of amicus briefs and the main or sole focus of all involved, except Petitioner.

stantial evidence" supporting a finding under the partial motivation standard.[5] Id. at 2.

Reasons for Granting the Petition

The unexplained determination of the court of appeals that there is no substantial evidence is wholly unfounded. In this case, the employer has taken the unusual step of putting both his impermissible motive and its direct relationship to the discharge in writing.[6] The Board, by a vote of 4-1, made a partial motivation finding -- based on these documents,

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5. Petitioner filed a motion for leave to file a new petition for rehearing en banc concerning the new issue in the amended opinion -- whether there was substantial evidence of partial motivation. This was denied by the panel, and a petition for rehearing en banc on the denial of this motion was also filed and denied.

6. The only discussion of the February, 1976 letter in the opinion directly contradicts the explicit language of the letter. Early in the opinion, the court stated that the company in the letter "conceded that [Petitioner] had acted within his rights" in filing complaints with federal agencies. Appendix A, at 5. To the contrary, the company said an employee could file such complaints but not a
(footnote cont. following page)

reasonable interpretations and inferences, and a detailed review of the record as a whole -- that is clearly supported by substantial evidence as this Court and every other circuit court have defined and applied that standard in prior decisions. Pursuant to that standard, a court of appeals must not substitute its view for that of the Board when there are two reasonable conflicting views. E.g., Central Hardware Co. v. NLRB, 407 U.S. 539 (1972); Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951); NLRB v. Craw, 565 F.2d 1267, 1270 (3d Cir. 1977); U.S. Soil Conditioning v. NLRB, 606 F.2d 940 (10th Cir. 1979); Amyx Industries, Inc. v. NLRB, 457 F.2d 904 (8th Cir. 1972). Special deference to the Board is appropriate where improper employer motive is the issue. PSC Resources, Inc. v. NLRB, 576 F.2d 380, 382-85 (1st Cir. 1978); NLRB v. Jack LeLanne Manage-

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(footnote cont. from preceding page)
steward:

> ". . . the Company's objection to these actions is based on the fact that Mr. Moran is a shop steward . . . His rights to take such individual actions, as anemployee, are not in question." Appendix D, at 2-3 (emphasis added).

ment Corp., 539 F.2d 292, 294 (2d Cir. 1976); NLRB v. Lou DeYoung's Market Basket, Inc., 406 F.2d 17, 22-23 (6th Cir. 1969).

The court of appeals has de facto modified and grossly misapplied the substantial evidence standard of review. The amended opinion does not explicitly state that a court of appeals can, for whatever reasons, simply substitute its view of the facts without explanation. But a comparison of the opinion with the Board's decision, which future litigants are likely to make, surely leads to the conclusion that the Third Circuit has modified the substantial evidence standard -- and that one can rely on the Board's detemination, and therefore on the Board as a mechanism of peaceful and fair resolution of labor disputes, only at considerable risk.

This erosion of the substantial evidence standard of review is particularly significant in the context of a §8(a)(4) violation. The Board has no jurisdiction to initiate action without a complaint, and therefore the intergrity and functioning of the Board and the statutory scheme depend on complainants coming forward and

being protected against retaliation. In Nash v. Florida Industrial Corp., 389 U.S. 235, 238 (1967), this Court said:

> "Implementation of the Act is dependent upon the initiative of individual persons who must, as petitioner has done here, invoke its sanctions through filing an unfair labor practice charge. Congress has made it clear that it wishes all persons with information about such practices to be completely free from coercion against reporting them to the Board."

See also NLRB v. Scrivener, 405 U.S. 117 (1972).

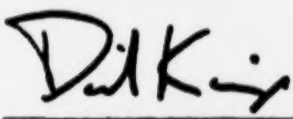
The conclusion of the court of appeals is appropriate only if it rejects the partial motivation rule, as it did in the original opinion. The opinion has been amended in this regard, but the court's reaffirmation of its result by simply saying "no substantial evidence" is unsupported and unsupportable. Indeed, particular substantive rules are of no particular significance -- and the Act and the Board offer no real protection to employees -- if, after years of successful litigation before the Board's administrative law judge and the Board itself, a clearly supported determination can be so

inexplicably overturned. The decision creates a bad precedent, is unfair to the particular litigant, and serves to undermine the social usefulness of our scheme of labor laws and the strong public policy of keeping labor disputes within established mechanisms by contradicting the fairness and viability of those mechanisms.

Conclusion

For the foregoing resaons, Petitioner prays that this Court issue a Writ of Certiorari.

Respectfully submitted,



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Appendix A - Opinion for United States Court of Appeals For The Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-2220

GOULD INCORPORATED, *Petitioner*

v.

THE NATIONAL LABOR RELATIONS BOARD, *Respondent*

JAMES MORAN, *Intervenor*

PETITION FOR REVIEW OF ORDER OF THE NATIONAL LABOR RELATIONS BOARD AND CROSS APPLICATION FOR ENFORCEMENT OF THAT ORDER

(Case No. 4-CA-8519)

Argued August 8, 1979

Before: ALDISERT and WEIS, *Circuit Judges*, and DIAMOND, *District Judge**

(Filed December 27, 1979)

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*Honorable Gustave Diamond, of the United States District Court for the Western District of Pennsylvania, sitting by designation.

Appendix A

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OPINION OF THE COURT

DIAMOND, J.:

Gould, Inc. (Gould) has petitioned for review of an order of the National Labor Relations Board (Board) in which it held that Gould committed unfair labor practices in violation of §§8(a)(1), (3), (4) of the National Labor Relations Act (Act), 29 U.S.C. §§158(a)(1), (3), (4),[1]

1. The pertinent parts of those Sections of the Act provide:

§8. Unfair labor practices

(a) It shall be an unfair labor practice for an employer

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under [this Act] . . . .

(Section 7 provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for . . . other mutual aid or protection . . . .")

when Gould discharged an employee for disciplinary reasons. The Board has filed a cross petition for the enforcement of that order. We have jurisdiction under §§10(e), (f) of the Act, 29 U.S.C. §§160(e), (f).

The principal question which we must decide is whether it was an unfair labor practice for the employer to single out for disciplinary discharge a union steward who participated with a number of rank-and-file union members in an illegal work stoppage where the steward failed to discharge his contractual obligation as a union officer to take steps to terminate that work stoppage. The Board held that it was. We disagree and, for the reasons set forth below, grant the petition for review and deny enforcement of the Board's order.

The relevant facts found by the administrative law judge (ALJ), affirmed by the Board, and which appear to be supported by substantial evidence, may be summarized as follows. On October 13, 1976, a number of members of Local 12, United Automobile Aero Space and Agricultural Implement Workers of America (Union) engaged in an illegal work stoppage at Gould's plant in Philadelphia, Pennsylvania. Among those participating in the strike was shop steward James P. Moran.[2] At the time of the work stoppage Gould and the Union were signatories to a collective bargaining agreement, Article XVI of which dealt with strikes and lockouts. Section 1 of that Article contained a no-strike clause, §2 provided that violators of the no-strike clause were subject to disciplinary action including discharge, and §3 required union officials to take positive steps to terminate illegal work stoppages.[3]

---

2. Gould disputes the Board's finding that Moran was a mere participant in the strike and argues that he not only participated but also instigated and led it. In our opinion, however, that distinction is immaterial.

3. The complete text of those sections follows:

Section 1. For the duration of this Agreement, and except for the failure of the Company or the Union to comply with the arbitration provisions of the Agreement, the Union agrees that

Appendix A

Following an investigation into the strike, Gould singled out Moran for discharge from among the group of approximately fifty illegal strikers, and the Union responded by filing a grievance. At a fourth step grievance meeting the company stated that it had singled out Moran for discipline because he failed to carry out his Article XVI §3 duty as steward to attempt to restore order and terminate the work stoppage and also because he had participated in a similar strike some three years earlier. To substantiate the latter claim, Gould cited ex-

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NOTE 3 — *(Continued)*

it shall not call, sanction, or engage in any strike, slowdown or stoppage of work; and the Company agrees that it shall not cause or engage in any lockout.

Section 2. Any employee or employees, either individually or collectively, who shall cause or take part in any illegal, unauthorized or uncondoned strike, work stoppage, interruption or impeding of work during the life of this Agreement may be disciplined or discharged by the Company. It is recognized that any such action by the Company shall be subject to the Grievance Procedure.

Section 3. In the event of an illegal, unauthorized or uncondoned strike, work stoppage, interruption or impeding of work, the Local and International Union and its officers shall immediately take positive and evident steps to have those involved cease such activity. These steps shall involve the following:

Within not more than twenty-four (24) hours after the occurrence of any such unauthorized action, the Union, its officers and representatives shall publicly disavow same by posting a notice on the bulletin boards throughout the plant. The Union, its officers and representatives shall immediately order its members to return to work, notwithstanding the existence of any wild-cat picket line.

The Union, its officers and representatives shall refuse to aid or assist in any way such unauthorized action.

The Union, its officers and representatives, will in good faith, use every reasonable effort to terminate such unauthorized action.

cerpts from a February, 1976, letter which it had sent to the Union's president complaining, inter alia, of Moran's participation in a 1973 illegal strike. In that letter Gould had also complained of certain other activities of Moran; specifically, his filing of charges against Gould with the Equal Employment Opportunity Commission (EEOC), the Occupational Safety and Health Administration (OSHA), and the Board itself. With regard to these acts, however, the letter stated that while the company believed that Moran should have first used or exhausted the parties' agreed-upon procedures for resolving disputes, it nevertheless conceded that he had acted within his rights.

The grievance subsequently was withdrawn and unfair labor charges were filed against petitioner with the Board whose General Counsel then filed a complaint against Gould. The complaint charged that in addition to Gould's above-stated bases for selecting Moran for discharge, it was also motivated by his having filed the various charges with EEOC, OSHA, and the Board and was thus in violation of §8 (a)(4) of the Act, which prohibits retaliation against those who file charges alleging labor law violations. The complaint further alleged that one of the company's admitted grounds for discharging Moran — his failure to attempt to restore order and terminate the work stoppage — was in and of itself violative of the provisions of §§8(a)(1) and (3) prohibiting, inter alia, interference with or discouragement of the exercise by employees of their right to organize or join unions.

As to the §§8(a)(1) and (3) charges the ALJ found that while as a steward Moran had a greater degree of responsibility than the other strikers under Article XVI §3, discharging him because he ignored that responsibility was unlawfully discriminatory. In this ruling, the ALJ relied on the Board's decision in *Precision Castings Company*, 233 NLRB 183 (1977). In that case the Board held that selection for discipline of a steward from among a group of illegal strikers on the ground that he

failed to restore order constituted "discrimination directed against an employee on the basis of his or her holding union office [and] is contrary to the plain meaning of Section 8 (a)(3)." 233 NLRB 184.

The ALJ also concluded that the §8 (a) (4) charge had been substantiated, finding that Gould's decision to discharge Moran "was affected or motivated, in part, by the fact that Moran had filed charges with or complained to EEOC and OSHA, and also because he had filed a charge with the NLRB."

The Board affirmed the ALJ's findings and conclusions. As to the §8(a)(4) violation for retaliatory conduct, the Board merely stated that it agreed with the conclusion that the evidence indicated Moran's filing of charges without prior resort to internal union procedures contributed to his discharge. In affirming the §§8(a)(1) and (3) violation, however, the Board set forth its reasoning in detail:

> Arguing that an individual may be discharged for violating a contract provision while acting in his position as union steward begs the question. Here the steward acted in concert with approximately 50 other employees, but was singled out for discipline solely because he was the steward. He was discharged not because of his actions as an employee, but because of his lack of actions as a steward, a legally impermissible criterion for discipline under the Act, and one which is not validated by a contract clause that specifies the responsibilities of union officers while acting as union officers. The contract is binding between the employer and the union, but does not grant the employer the power to enforce it by discharging union officials. The employer's recourse is against the union entity rather than against the individuals who serve the unit by holding union office. Employer self-help against individual union officials for a union's breach of contract

> can only undermine the peaceful settling of disputes and clears a path for employer intervention in a union's internal affairs in a way that is specifically barred to unions in the corollary situation by Section 8(b)(1)(B), which prohibits restraint or coercion of an employer in the selection of his representatives for collective bargaining or adjusting grievances. 237 NLRB No. 124, 2-3.

We first consider the law applicable to the §§8(a)(1) and (3) violations and begin by noting our prior holding that "strikes carried out in violation of a no-strike provision in a collective bargaining agreement are not protected by the Act, and therefore the discharge of employees who engage in such strikes is not an unfair labor practice." *Food Fair Stores, Inc. v. NLRB*, 491 F.2d 388, 395 (3rd Cir. 1974). Also relevant are Board rulings that an employer need not fire all illegal strikers, but may "pick and choose" which participants will be discharged as long as the basis for so doing is not union related. *Precision Castings, supra; Chrysler Corp.*, 232 NLRB 466, 474 (1977); *McLean Trucking Co.*, 175 NLRB 440, 450-51 (1969). See also *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 59 S.Ct. 490, 83 L.Ed. 627 (1939). And we note, finally, the holding of the Supreme Court in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 87 S.Ct. 1792, 18 L.Ed.2d 1027 (1967), that if the discriminatory discipline complained of is so inherently destructive of employee rights there is no need to establish any specific anti-union motivation in order to sustain a §8(a)(3) violation.

While there may be some question as to the Board's earlier position on the issue,[4] in *Precision Castings* the

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4. On several occasions prior to its decision in *Precision Castings*, the Board reviewed the discharge of union stewards following their participation in illegal strikes and found no unfair labor practice. See *Super Valu Xenia*, 228 NLRB 1254 (1977); *Chrysler Corp.*, supra; *J. P. Weaterhy Construction Co.*, 182 NLRB 690 (1970);

Board flatly held that the selective dismissal, in and of itself, of a shop steward who participated in and made no effort to terminate an illegal strike constituted discrimination based solely on the holding of union office and, thus, was violative of §§8(a)(1) and (3). However, when the Board followed *Precision Castings* with a similar ruling in *Ind. & Mich. Elec. Co.*, 237 NLRB No. 35 (1978), that ruling was reversed on appeal, *Ind. & Mich. Elec. Co. v. NLRB*, 599 F.2d 227 (7th Cir. 1979). The Board had ruled that the greater responsibility which accompanies the holding of union office was insufficient reason for imposing more severe discipline on officers than rank-and-file strikers. In reversing, the court reasoned:

> Employees have no right to participate in an illegal strike. Accordingly, if an employee right is threatened here, it must be one relating to union office. The Board has said and we recognize that union office 'embodies the essence of protected concerted activities.' See *General Motors Corp.*, 218 N.L.R.B.

NOTE 4 — *(Continued)*

Russell Packing Co., 133 NLRB 194 (1961); *University Overland Express, Inc.*, 129 NLRB 82 (1960); and *Stockham Pipe Fittings, Co.*, 84 NLRB 629 (1949). The General Counsel now seeks to distinguish those cases on the ground that they involved stewards who exercised a leadership role in the strike, whereas here Moran was a mere participant. From our review of the cases it does not appear that *Precision Castings* is as consistent with prior Board rulings as the General Counsel would maintain. First, we note that certainly in *Super Valu Xenia* and arguably in *Russell*, the steward did not exercise a leadership role. Second, even where leadership apparently existed, the Board gave little, if any, indication that this was a controlling factor; i.e. that in its absence a §8(a)(3) violation would not have been found. In fact, in *Stockham* and *Overland Express* the Board acknowledged that union officials have a greater responsibility to abide by a no-strike clause than do the rank-and-file, thus suggesting at least that mere participation in an illegal strike by a union officer might be a sufficient basis for his selective discipline.

472, 477 (1975), *enforced*, 535 F.2d 1246 (3rd Cir. 1976). Employer action that would impair some right or restrict some legitimate activity of union officials and thereby discourage members from holding office would no doubt have an inherently adverse affect on employee rights. The same is not true, however, of employer action that at most deters union officials from deliberately engaging in clearly unlawful conduct that is both a violation of their duties as employees and union members and a repudiation of their responsibilities as union officials.

In arguing that status as a union official may not be the sole criterion for differentiating among employees in meting out discipline, the Board somewhat misstates the issue. The more severe punishment was not based merely on the officials' status but upon their breach of the higher responsibility that accompanies that status, a breach that makes their misconduct more serious than that of the rank-and-file. 599 F.2d 230

. . . .

Differentiating between union officers and rank-and-file in meting out discipline for participating in a clearly illegal strike (footnote omitted) did not penalize or deter the exercise of any protected employee right. We believe the employer was entitled to take into account the union officials' greater responsibility and hence greater fault, and that the resulting different treatment of union officials could not be reasonably considered inherently destructive of important employee rights. 599 F.2d 232

We concur in that reasoning and believe that it applies as well to the instant case and supports our conclusion that the Board's finding of a §8(a)(1) and (3) violation must be vacated. More specifically, we cannot agree

with the Board's deduction that since Moran was a steward and was discharged it follows logically that he "was singled out for discipline *solely because* he was the steward." On the contrary, it is clear that he was disciplined because he participated in an illegal strike and failed to perform his contractual obligation to take positive steps to halt that work stoppage. True, this duty devolved upon him because he fell within the *class* of persons upon whom the collective bargaining agreement imposed that duty, to wit, officers of the union, but the agreement could just as well have imposed this duty on individuals by name regardless of their office, and the result would be the same. In other words, it was a breach of a duty *imposed* by his office and not his office *as such* which formed the basis for his discharge. Viewed in this light, Moran's discharge was permissible and did not constitute an unfair labor practice. Indeed, if we were to hold otherwise, the union officer who participated in an illegal work stoppage would be placed in a more advantageous position than the rank-and-file member, and this would be neither fair, logical nor just.

The General Counsel's argument that since the company lacked the right under the contract to discharge Moran for violating Article XVI §3 his discharge was unlawful is unpersuasive. It is true that §3 contains no provision for the discipline of those who violate it, however, §2 does give the company the right to discharge those who participate in illegal work stoppages. Section 3 of Article XVI was relied upon merely as a basis for singling out Moran from among the strikers subject to discharge. This was lawful.

Having concluded that Moran had a contractual duty to take positive steps to terminate the illegal work stoppage and that his breach of that duty served as a basis for invoking a right of discharge otherwise existing, we inquire whether such action was inherently prejudicial of important employee rights. Here, too, we concur

with the court's reasoning in *Ind. & Mich. Elec. Co.* that logically no prejudice to employee rights can result where the employee is merely deterred from engaging in illegal activity and from breaching a contractual obligation, neither of which he has a *right* to do. As for the contention that as a result of this ruling prospective stewards will be dissuaded from seeking union office, the obvious and short answer is that they should be deterred from seeking office if they intend thereafter to participate in illegal work stoppages or to repudiate contractual obligations which were freely negotiated and voluntarily assumed. The company's action and our ruling deters no other kind of "union" activity. *Cf. American Ship Building Company v. NLRB*, 380 U.S. 300, 85 S.Ct. 955, 13 L.Ed. 2d 855 (1965).

Finally, we cannot accept the Board's holding that the employer's proper remedy in a case such as this is a suit against the union for money damages. *Assuming* that such a claim could be maintained against the union, we see no reason why the employer should be remitted to such a course of action where the collective bargaining contract plainly gives the employer recourse directly against an offending officer, the assertion of which the employer in its judgment may very well conclude would have a more immediate and prophylactic effect. For it is undoubtedly true in many illegal strike situations that the employer would prefer to obtain a prompt resumption of production than a money judgment after a prolonged strike and expensive and protracted litigation. And it is certainly fair to assume that usually it is the steward or some other union official close to the scene who has the power, authority and influence most effectively to quash an illegal strike during its infancy or to prolong it indefinitely. The threat of his disciplinary discharge, therefore, is a valuable option which the employer should not be prohibited from exercising where it has been contractually acquired.

We now consider the §8(a)(4) violation. As earlier noted, §8(a)(4) of the Act makes it an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges. . . ." The Board affirmed the ALJ's ruling that Moran's discharge was "affected or motivated in part" because he had filed charges with EEOC, OSHA and the Board. However, this falls short of holding that Moran was discharged "because of" these protected activities. This court previously held that where an employee's discharge is prompted by concurrent reasons, some permissible and some not, in order to support a ruling of an unfair labor practice the Board must find that the permissible reason proffered by the employer is merely a pretext and that in fact the employee was disciplined because of anti-union sentiment. *Edgewood Nursing Center, Inc. v. NLRB*, 581 F.2d 363 (3rd Cir. 1978) To put it another way, if it is found that the employee would have been disciplined for proper cause notwithstanding the employer's attitude toward the union, the discipline must be held to be non-discriminatory, because in that case the causal relationship between the anti-union bias and the discipline would be insufficient to support a conclusion that the discipline was administered "because of" the protected activity and that the proffered proper reason was a pretext, it being elementary logic that the discipline could not be "because of" anti-union bias if the discipline would have resulted notwithstanding the absence of such bias. And, therefore, as we held in effect in *Edgewood Nursing*, in a mixed-motivation case unless the Board finds that in the absence of the impermissible motive the discipline would not have occurred, there can be no holding of a §8(a)(4) unfair labor practice. There was no such finding in the instant case, and since from our review of the entire record we conclude that, indeed, there is no substantial evidence to support such a conclusion, the Board's holding of a §8(a)(4) violation also must be vacated.

The petition for review will be granted and the application for enforcement will be denied.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Appendix B - Order for United States Court of Appeals For The Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-2220

GOULD INCORPORATED,
Petitioner

v.

THE NATIONAL LABOR RELATIONS BOARD,
Respondent

JAMES MORAN, *Intervenor*

PETITION FOR REVIEW OF ORDER OF THE NATIONAL LABOR RELATIONS BOARD AND CROSS APPLICATION FOR ENFORCEMENT

(No. 4-CA-8519)

Present: ALDISERT and WEIS, *Circuit Judges*, and DIAMOND, *District Judge*.*

ORDER

It is ORDERED that the slip opinion in the above, filed on December 27, 1979, is hereby amended as follows:

Page 12. Delete the last two sentences and substitute the following therefor:

> We reaffirm this court's previous statement of the proper precept to be applied where there is a mixed motivation attending employer's action: "Although there might exist a justifiable cause for discharge of an employee, there is a violation of the Act if the real motive for the discharge is found to be the employer's dislike of union activity or affiliation. . . . Such

* Honorable Gustave Diamond, of the United States District Court for the Western District of Pennsylvania, sitting by designation.

real motive will be found where union activity by the employee is recognized as a substantial or motivating cause of his discharge." *N.L.R.B. v. Gentithes*, 463 F.2d 557, 560 (3d Cir. 1972) (per Chief Judge Seitz). It is also controlling case law of this court that where there is substantial evidence that the employee's discharge was motivated by the employee's protected activity, there is a violation of the Act notwithstanding the concurrent existence of an otherwise valid reason. *N.L.R.B. v. Princeton Inn Co.*, 424 F.2d 264, 265 (3d Cir. 1970). From our review of the entire record we conclude that there is no substantial evidence to support a finding that Moran's discharge was because he had filed charges with the EEOC, OSHA, and the Board. Accordingly the Board's holding of a §8(a)(4) violation must be vacated.

BY THE COURT,

RUGGERO J. ALDISERT
Circuit Judge

DATED: March 13, 1980

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Appendix C - Judgment United States Court of Appeals
For The Third Circuit

RECEIVED
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U.S.C.A. 3RD. CIR.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

GOULD INCORPORATED,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.
JAMES MORAN,
Intervenor

No. 78-2220

JUDGMENT

Before: Aldisert and Weis, Circuit Judges, and Diamond District Judge.*

THIS CAUSE came on to be heard upon a petition filed by Gould Corporation to review an order of the National Labor Relations Board, directed against said petitioner, its officers, agents, successors, and assigns on August 25, 1978, and upon the Board's cross-application to enforce said order. The Court heard argument of respective counsel on August 8, 1979, and has considered the briefs and transcripts of record filed in this cause. On December 27, 1979, the Court being fully advised in the premises, handed down its opinion denying enforcement of the Board's order. In conformity therewith it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the Third Circuit that the cross-application for enforcement of said order of the National Labor Relations Board in said proceeding be, and it hereby is denied.

DATED: February 25, 1980

By the Court

Circuit Judge

* Honorable Gustave Diamond of the United States District Court for the Western District of Pennsylvania, sitting by designation.

Appendix C - Petition for Rehearing En Banc

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 78-2220

GOULD CORPORATION, Petitioner

vs.

THE NATIONAL LABOR RELATIONS BOARD, Respondent

JAMES MORAN, Intervenor

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, and ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, Circuit Judges,* and DIAMOND, District Judge. **

The petition for rehearing filed by

Intervenor

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Aldisert

Judge

Dated: March 14, 1980

* Judge Rosenn did not participate in the consideration of this matter.

** Honorable Gustave Diamond, of the United States District Court for the Western District of Pennsylvania, sitting by designation.

GC-3 Appendix D - Letter of ITE Imperial Corporation Dated February 18, 1976

ITE Imperial CORPORATION (5)

February 18, 1976

United Auto Workers
Local #1612
1836 Callowhill St.
Philadelphia, Pennsylvania

Attention: Mr. F. Redmiles, President

Dear Sir:

Over the past several years, there have been several instances where Union Representatives have acted in a manner contrary to that prescribed by the Collective Bargaining Agreement and/or Appendices, thereto. When such matters have occurred, we have advised you and requested correction in verbal discussions. Unfortunately, however, we must now formally advise you that the actions of one particular Union Representative in the LACB Division repeatedly violates the procedures established for resolving disputes.

On several occasions, we have specifically discussed the actions of Mr. James Moran, Shop Steward for "2" Shift employees in the M-3 Machine Shop. The Company has advised you on at least five occasions of instances when Mr. Moran's actions as a Shop Steward were entirely inappropriate, if not in absolute violation of the Collective Bargaining Agreement. To be specific, the following occasions have given rise to Company initiated dialogue on this Shop Steward's actions:

1. In August 1973, Mr. Moran's actions as a Shop Steward resulted in a work stoppage on the second shift in the LACB Division. Shortly, following that instance, Union Officers were contacted and the illegal actions were handled responsibly by those Officers. Subsequent to that action, Mr. Moran was verbally warned in a meeting in which the undersigned, yourself, Harold Strack - Manufacturing Manager and Mr. Moran were present, that his actions were in violation of the Collective Bargaining Agreement and that recurrence of those actions could result in discipline up to and including discharge.

2. On several occasions during 1974, Mr. Moran was verbally advised that his actions in utilizing Company paid grievance time to prepare and file First Step Grievances on "placement"

matters were inappropriate and in violation of the Agreement. On at least three occasions, Mr. Moran and Union Officers, including yourself, were advised verbally that such action was improper; however, the Company paid Mr. Moran for each such instance. Finally, in January 1975, after ignoring three previous warnings, Mr. Moran was refused payment for a fourth such action.

3. In June 1975, Mr. Moran notified the Occupational Safety and Health Administration Officers of an alleged health violation in "M" Building (absence of water closet doors) without availing himself of internal mechanisms available for resolving such a matter.

4. In August 1975, Mr. Moran filed a charge with the National Labor Relations Board that he was laid off improperly. This action was taken while a grievance was in process. The grievance was filed on Mr. Moran's behalf by the Union.

5. In May 1975, Mr. Moran filed a charge with the E.E.O.C. on behalf of an employee whom he represented alleging sex discrimination, again, without availing himself of the internal mechanisms available.

Before going further, it is important to note that, in the past, the parties have repeatedly agreed to attempt to resolve disputes internally before resorting to external means. To that end, the parties have established several mechanisms within the Collective Bargaining Agreement and Appendices, thereto, to provide for resolution of a wide variety of issues that could materialize. For the most part, both parties and their representatives have operated within the framework of the Agreements referred to above.

The instances noted in paragraphs one and two above were discussed as each occurred and considered to be resolved at this point in time, but have been referred to for background purposes. However, the matters referred to in paragraphs three, four, and five certainly represent a violation of the philosophy and intent of the parties and quite possibly an absolute violation of the Collective Bargaining Agreement. It is important to note that the Company's objection to these actions is based on the fact that Mr. Moran is a Shop Steward and, as such, is particularly bound to administer the Collective Bargaining Agreement and policies of the parties in a manner prescribed by the parties. His rights to take

continued...

ITE Imperial Corporation

such individual actions, as an employee, are not in question.

Again, unfortunately, the Company finds it necessary to formally advise you of these actions and request corrective action since, to date, verbal discussions have not resulted in diminishing this Shop Steward's propensity to engage in violations of the parties intent and/or the Collective Bargaining Agreement. It is incumbent upon the Union to take appropriate measures to preclude repetition of such actions on the part of its Officers and Representatives. Therefore, the Company requests your careful attention to this matter and immediate action.

Very truly yours,
ITE IMPERIAL CORPORATION

J. J. Panciera
Manager, Employee Relations
LACE Division

JJP/a
cc: F. J. Hannings, Chairman, Bargaining Committee
Management Nego. Committee
Joseph Ferrara, Area Director

bcc: H. Strack

Appendix D

ITE Imperial

November 8, 1976

United Auto Workers Union
Local 1612
1836-38 Callowhill Street
Philadelphia, Penna. 19130

Attention: Mr. P. Hannings, Chairman, Bargaining Committee

Dear Sir:

Present for the Company	Present for the Union
W. P. Bolger	P. Redmiles
W. D. Breder	P. Hannings
C. C. Server	J. Brennan
J. J. Panciera	J. Cleary
J. R. Slenn	J. Delaney
J. R. Macklin	A. Gentile
G. Nichol	A. Pierro
	M. Rodgers
	C. Monaghan

These are the minutes of the meeting which was held on October 25, 1976, between the U.A.W., Local #1612 and Management to discuss the grievances and other matters which are outlined below. The order of this resume follows the order of discussion at the meeting.

1. LACB 3434 - J. Moran - Discharge - (Item 59 Union Recap Letter 10/22/7

The details of this grievance can be seen in the grievance filed and the grievance answers issued in the preceding steps of the procedure. The Union argued that Mr. Moran (who was discharged for violation of Article XVI of the Collective Bargaining Agreement) should not have been discharged, since they contended that his activities on the night of October 13, 1976, were not in violation of the Agreement. The Union stated that the position was based on two factors: 1) A petition signed by the employees who stated that Mr. Moran did not direct them to stop work and that he had asked them to return to work. 2) The Union stated that Mr. Moran joined with several Union Representatives in asking the employees to return to work at approximately 5:45 p.m.

The Company advised the Union that its information indicated that Mr. Moran's activities that evening were in violation of Article XVI of the Collective Bargaining Agreement. The Company stated that it did

ITE Distribution & Controls

not accept the Unions contention that Mr. Moran did not cause the employees to stop work, and that he directed employees to return to work, since the employees only returned to work after Union Officials appeared at the scene. However, in the main, the Company advised the Union that Mr. Moran's statements and actions during the work stoppage which occurred were, in the Company's opinion, clearly in violation of Article XVI of the Collective Bargaining Agreement. The statements and actions which placed Mr. Moran, the Shop Steward for the affected area, in violation of Article XVI were attested to by supervision and were outlined to the Union during the grievance discussion.

After thorough review and discussion, the Company advised the Union that in light of Mr. Moran's actions and statements on the evening of October 13, 1976, which were contrary to the obligations of a Shop Steward and, in view of his past actions as an employee and Shop Steward which indicates repeated violations of the Collective Bargaining Agreement, other agreements, and Company Policy, the Company feels that the discharge in this case was entirely justified. (The Company also outlined Mr. Moran's past violations of the Agreement as a Shop Steward which were discussed in a letter to the Union dated February 18, 1976, copy attached, as well as Mr. Moran's record as an employee.) Therefore, the Company sustained its position and the discharge will stand.

Supreme Court, U. S.
FILED
JUN 26 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1979

No. 79-1946

JAMES MORAN,

Petitioner,

vs.

GOULD CORPORATION and NATIONAL LABOR RELATIONS BOARD,

Respondents.

SUPPLEMENTAL APPENDIX FOR PETITIONER

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UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 78-2220

GOULD INCORPORATED,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

JAMES MORAN,

Intervenor

Before: Aldisert and Weis, Circuit Judges, and Diamond District Judge.*

THIS CAUSE came on to be heard upon a petition filed by Gould Corporation to review an order of the National Labor Relations Board, directed against said petitioner, its officers, agents, successors, and assigns on August 25, 1978, and upon the Board's cross-application to enforce said order. The Court heard argument of respective counsel on August 8, 1979, and has considered the briefs and transcripts of record filed in this cause. On December 27, 1979, the Court being fully advised in the premises, handed down its opinion denying enforcement of the Board's order. In conformity therewith it is hereby

Judgment

ORDERED AND ADJUDGED by the United States Court of Appeals for the Third Circuit that the cross-application for enforcement of said order of the National Labor Relations Board in said proceeding be, and it hereby is denied.

DATED: February 25, 1980

By the Court

s/ Aldisert J
Circuit Judge

* Honorable Gustav Diamond of the United States District Court for the Western District of Pennsylvania, sitting by designation.

PETITION FOR REHEARING EN BANC

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 78-2220

GOULD CORPORATION,

Petitioner

v.

THE NATIONAL LABOR RELATIONS BOARD,

Respondent

JAMES MORAN,

Intervenor

Present: SEITZ, *Chief Judge*, and ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges*,* and DIAMOND, *District Judge*.**

The petition for rehearing filed by Intervenor in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Petition

By the Court,

s/ Aldisert
Judge

Dated: March 14, 1980

* Judge Rosenn did not participate in the consideration of this matter.

** Honorable Gustave Diamond, of the United States District Court for the Western District of Pennsylvania, sitting by designation.

DECISION OF THE NATIONAL LABOR RELATIONS BOARD

August 25, 1978

DECISION AND ORDER

On November 18, 1977, Administrative Law Judge Ralph Winkler issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed cross-exceptions and briefs, and Respondent filed a brief in response to the cross-exceptions.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

The collective-bargaining contract has a no-strike clause and requires union officers to "use every reasonable effort to terminate such unauthorized action." Union Steward Moran joined a 2-hour work stoppage in support of a grievance, but he neither instigated nor led the stoppage.

Respondent discharged Moran, but none of the other employees, for violating the no-strike clause. Respondent denied the Union's request for mitigation because of a previous verbal warning to Moran in connection with a 1973 stoppage. For details, Respondent referred to a February 1976 letter, advising the union president that Moran had "repeatedly violated the procedures established (contractually) for resolving disputes." The letter noted that, in addition to participating in a 1973 stoppage, Moran had filed charges with OSHA, EEOC, and NLRB, without first using agreed-upon procedures. An internal progress report regarding the discharge states that as a shop steward Moran has a "particular obligation to observe the [contract]," which he did not do during the most recent stoppage nor in his "past actions" as an employee and shop steward.

The Administrative Law Judge concluded that Respondent violated Section 8(a)(3) because its discipline of Moran was based on Moran's union status rather than on his conduct as an employee. He relied

on *Precision Castings Company*, 233 NLRB 183 (1977), wherein the Board found unlawful the employer's disciplining of only the union stewards following an unauthorized stike, admittedly because as stewards they participated in the strike rather than urging other employees to return to work. He also concluded that Respondent violated Section 8(a)(4), evidenced by the content of the internal progress report. We agree.

One of our dissenting colleagues dismisses as a "simplistic approach," and the other chooses to ignore, the fundamental axiom of our national labor policy: an individual cannot be discriminated against becuase of his union status. Arguing that an individual may be discharged for violating a contract provision while acting in his position as union steward begs the question. Here the steward acted in concert with approximately 50 other employees, but was singled out for discipline solely because he was the steward. He was discharged not because of his actions as an employee, but because of his lack of actions as a steward, a legally impermissible criterion for discipline under the Act, and one which is not validated by a contract clause that specifies the responsibilities of union officers while acting as union officers. The contract is binding between the Employer and the union, but does not grant the employer the power to enforce it by discharging union officials. The employer's recourse is against the union entity rather than against the individuals who serve the unit by holding union office. Employer self-help against individual union officials for a union's breach of contract can only undermine the peaceful settling of disputes and clears a path for employer intervention in a union's internal affairs in a way that is specifically barred to unions in the corollary situation by Section 8(b)(1)(B), which prohibits restraint or coercion of an employer in the selection of his representatives for collective bargaining or adjusting grievances.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Re-

lations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Gould Corporation, Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

MEMBER TRUESDALE, concurring in part and dissenting in part:

In agreement with the majority, I would affirm the finding of the Administrative Law Judge that Respondent unlawfully relied on Moran's prior complaints to various Government agencies in justifying its decision to discharge him after the unauthorized work stoppage. Just as a labor organization may not, through removal, discipline a steward who seeks relief from the Board or other Government agencies outside the contractual grievance procedure,[1] so an employer may not, through discharge, discipline a steward who engages in the same activity. For this reason, I would find that, by discharging Moran, Respondent violated Section 8(a)(1) and (4) of the Act.

However, in disagreement with the majority, I would not find that Respondent violated Section 8(a)(3) of the Act and would therefore dismiss that portion of the complaint. The record shows that, under the collective-bargaining agreement, "any employee or employees, either individually or collectively, who shall cause or take part in any illegal, unauthorized, or uncondoned strike, work stoppage, interruption or impeding of work during the life of this Agreement, may be disciplined or discharged by the Company." Furthermore, Moran, as steward, was obligated under the collective-bargaining agreement to "immediately order [Union] members to return to work," to "refuse to aid or assist in any such unauthorized action," and to "use every reasonable effort to terminate such unauthorized action."

There is no question that Moran not only failed to take any steps to end the unauthorized work stoppage, but in fact actively encouraged its continuation. I believe the majority would agree that, under

---

[1] *General American Transportation Corporation*, 227 NLRB 1695 (1977); *Amalgamated Meat Cutters (National Tea Company)*, 181 NLRB 773 (1970).

the collective-bargaining agreement, any employee other than a union officer who acted as Moran did could be discharged by Respondent. I would further find that Moran's status as a steward does not shield him from the consequences which would be visited on any other employee, and would therefore find that Respondent did not act unlawfully in discharging this employee, who violated the contractual no-strike provision and encouraged his coworkers to do the same.

In finding a violation, the Administrative Law Judge relied on *Precision Castings Company,* 233 NLRB 183 (1977). I disagree with the holding of that case because, in my judgment, it is not sound either as a matter of law or as a matter of policy. With regard to the former, the Board, in finding a violation in *Precision Castings,* cited *Pontiac Motors Division, General Motors Corporation,* 132 NLRB 413, 415 (1961), a case which is factually distinguishable. In *Pontiac Motors,* the union official involved "neither caused nor took part in the work stoppage" for which he was disciplined. Accordingly, the Board's decision in *Precision Castings* is without any clear precedent.

More importantly, it is well established that an employer faced with an unprotected strike in the face of a no-strike clause need not discharge or otherwise discipline all employees who participate. *California Cotton Cooperative Association, Ltd.,* 110 NLRB 1494 (1954); *McLean Trucking Company,* 175 NLRB 440, 450–451 (1969); *Chrysler Corporation, Dodge Truck Plant,* 232 NLRB 466 (1977). The majority's position would appear to say that the employer can, of course, discipline all unlawful strikers, but if it chooses to discipline only some of them, the "mix" had better include rank-and-file employees as well. As noted, I do not believe that an employee's position in the union should provide a basis for insulating that employee from otherwise legitimately imposed discipline for engaging in unprotected activity.

Furthermore, where, as here, the Union has bound itself and its agents contractually to take affirmative steps to end any work stoppage, I would find that it is not unlawful for Respondent to discipline an agent of the Union who has instead taken steps to prolong the stoppage. To hold otherwise would render mean-

ingless the Union's clear and unmistakable contractual commitment to "use every reasonable effort to terminate such unauthorized action." For the Union has committed itself—presumably as a contractual *quid pro quo*—not only not to condone unauthorized work stoppages by the employees, but also to do everything in its power to end such stoppages immediately. Were we to find that the discharge of the steward here for leading the unauthorized strike was discriminatory under the Act, we would undermine the Union's commitment, contrary to the national policy favoring the peaceful resolution of labor disputes.

For all these reasons, I would overrule *Precision Castings, supra,* on which the Administrative Law Judge relied.

Finally, it is important to note what this case does *not* involve. Unlike our recent decision in *Owens Corning Fiberglas Co.,* 236 NLRB No. 32 (1978), this case does not concern a union steward who was singled out and disciplined for engaging in conduct which had been condoned for years when engaged in by rank-and-file employees. Rather, it concerns a steward who, contrary to his contractual obligation as a representative of the Union, abetted an unauthorized work stoppage despite the fact that the grievance to which the protest related was then being processed through legitimate contractual channels.[2]

For the above reasons, I would dismiss that portion of the complaint alleging a violation of Section 8(a)(3) of the Act.

MEMBER PENELLO, dissenting:

For the second time in the past 6 months, my colleagues of the majority have decided that an employer may not lawfully discharge a union steward who participates in an unauthorized illegal work

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[2] Similarly, in *Super Valu Xenia, a Division of Super Valu Stores, Inc.,* 228 NLRB 1254 (1977), the Board upheld an Administrative Law Judge's finding that the respondent in that case had not violated the Act by disciplining and discharging stewards who joined an unauthorized work stoppage in derogation of their responsibilities as stewards. I would find *Super Valu* controlling in both *Precision Castings* and the instant case.

stoppage and who fails to fulfill his responsibilities and duties under the collective-bargaining agreement. In their extraordinarily simplistic approach to the problem, the majority opinion in the instant case, as well as the decision in *Precision Castings Company*, 233 NLRB 183 (1977), on which they rely, completely ignores the following relevant factors: (1) that Union Steward Moran was discharged not *solely* because he was a union steward, but rather because in his position as a union steward he failed to fulfill his affirmative duties under the collective-bargaining agreement to end the illegal work stoppage; (2) that to violate Section 8(a)(3) of the Act, a discriminatory discharge must not only be union-related, but must also have as its purpose the encouragement or discouragement of union membership; and (3) that the fundamental importance of the grievance-arbitration system and its companion no-strike agreement to the peaceful settlement of labor-management disputes, as mandated by Congress, applied by the courts and the Board, and consistently interpreted by a long line of arbitral authority, will be seriously undermined by their decision. For these reasons, as fully discussed below, I vigorously dissent from the majority's opinion in the instant case, and I would dismiss the complaint in its entirety.

The basic facts are not in dispute. Respondent has had a long collective-bargaining history with the Union. The alleged discriminatee, James P. Moran, was elected a union shop steward in 1971. At the time of his discharge, he was the steward on the "B" shift (4 p.m. to 12:30 a.m.) representing employees on the first and third floors. Moran's immediate supervisor was Foreman Roger Scott.

Several days before his discharge, Moran had filed a grievance concerning the performance of alleged contract-unit work (expediting) by a supervisor. Although Respondent had a prescribed time within which to respond, the period was extended by the Union at Respondent's request. However, a number of employees were concerned about the grievance and, without waiting for management's response, approximately 50 third-floor employees engaged in an unauthorized work stoppage by congregating in the timeclock area from about 4 until 6 p.m. on October

13, 1976. After the employees had ceased work for about 30 minutes, Scott asked Moran to return to his work area, but Moran replied that "I'm not going back to work until we get an expediter." Shortly thereafter, Scott stood in front of the assembled employees near the timeclock and asked them to return to work. Moran, who was standing next to Scott in front of the assembled employees, stated for all to hear that he was taking his coffeebreak, that all the other employees were entitled to do the same thing, and that "we aren't going back to work until we find out what's going to happen [on the 'expediting' grievance]." The work stoppage finally ended through the efforts of Union Representatives Brennan and Hannings.

On October 19, Respondent notified Moran that he was terminated effective October 21 for "violation of Article XVI of the collective bargaining agreement." [3] Moran was the only employee discharged for the October 13 work stoppage.

The Union filed a grievance concerning Moran's discharge. At a fourth-step grievance meeting, the Union inquired as to whether Respondent would consider a reduction or mitigation of Moran's discharge. Respondent's director of industrial relations, Jeffrey Panciera, refused to reduce the discharge because of Moran's prior participation as a union steward in a 1973 work stoppage. Panciera then referred to a letter dated February 18, 1976, which was written by Respondent to the Union concerning Moran, in which Respondent complained about Moran's involvement in a 1973 work stoppage. The letter stated

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[3] According to art. XVI, sec. 1, of the collective-bargaining agreement, "the Union agrees that it shall not call, sanction, or engage in any strike, slowdown or stoppage of work." Sec. 2 states that "any employee or employees, either individually or collectively, who shall cause or take part in any illegal, unauthorized, or uncondoned strike, work stoppage, interruption or impeding of work during the life of this Agreement, may be disciplined or discharged by the Company." Finally, sec. 3 states that in the event of an unauthorized work stoppage, the Local, its officers, and its representatives must "order its members to return to work," "refuse to aid or assist. . .the unauthorized action," and "use every reasonable effort to terminate such unauthorized action."

that Moran was verbally warned that he could be discharged for again engaging in an illegal work stoppage. The Union then requested that Panciera read the rest of the letter, which complained about Moran's repeatedly going outside of the contractual procedures for resolving disputes, such as his filing complaints with the EEOC, OSHA, and NLRB without utilizing or exhausting the agreed-upon contractual procedures for resolving such disputes. The conduct described in the February 18 letter was based on Moran's status as a union steward and that Moran was particularly bound by such status to administer the collective-bargaining agreement. The letter specifically stated, however, that "his rights to take such individual actions, as an employee, are not in question." Respondent in the February 18 letter did not threaten to discipline Moran for his activities, but merely requested that the Union advise Moran of his duties under the collective-bargaining agreement.

Based upon the evidence above, the Administrative Law Judge concluded that Moran's discharge for willfully failing the responsibility of his union position was clearly union-related and, thus, it violated Section 8(a)(3) and (1) of the Act. The Administrative Law Judge relied solely on the Board's recent decision in ***Precision Castings Company, supra,*** to support his conclusion.[4] In addition, the Administrative

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[4] The facts in *Precision Castings Company* are strikingly similar to the facts in the instant case. Five union stewards were suspended for failing to abide by their contractual responsibility to take all reasonable steps to terminate an unauthorized work stoppage which violated a contractual no-strike clause. The suspended stewards had not been active in calling or conducting the strike, although they had clearly participated in it. A panel of Chairman Fanning and Members Jenkins and Murphy reversed the Administrative Law Judge's finding that the respondent had lawfully invoked its right under the no-strike clause of the contract to suspend the five union stewards. According to the panel, the respondent was free to discipline anyone as long as the criterion was not "union related." Since the respondent admitted that the reason for suspending the five union stewards was because of their position in the union and their failure to urge the strikers to return to work, the panel concluded that such conduct was "discrimination directed against an employee on the basis of his or her holding union office [which] is contrary to the plain meaning of section 8(a)(3) and would frustrate the policies of the Act if allowed to stand."

Law Judge concluded that Moran's discharge was motivated in part by Moran's having filed charges or complaints with the EEOC, OSHA, and NLRB, and, thus, Respondent violated Section 8(a)(4) of the Act as well.

The fallacy in the rationale employed by my colleagues in the present case, as well as in *Precision Castings,* is painfully obvious even to the unsophisticated observer. In the simplified view of the majority, the Employer in the instant case, as well in *Precision Castings,* singled out the union stewards from among all the employees for discipline *solely* because they were stewards. However, the majority overlooks the crucial fact that the stewards in both cases were *not* disciplined *solely* because they were union stewards, but rather because they had failed to fulfill the duties required of a union steward under the collective-bargaining agreement to take all reasonable steps necessary to end an unauthorized, illegal work stoppage. In the instant case, the collective-bargaining agreement specifically requires that, in the event of an illegal work stoppage, union stewards must use every effort to get the employees back to work and to refuse to aid or assist the work stoppage. Moran did absolutely nothing to end the work stoppage and, in fact, he affirmatively aided and assisted the stoppage by his statements in front of all of the striking employees.

In addition to this erroneous factual finding, the majority's application of Section 8(a)(3) of the Act is incorrect as well. One of the most firmly established principles of labor law states that, for a discharge to be found discriminatory under Section 8(a)(3) of the Act, there must be proof that the discrimination had as its purpose the encouragement or discouragement of union membership.[5] There has been no such showing in the instant case, nor in *Precision Castings.* Rather, the employer in both cases was merely attempting to enforce a valid collective-bargaining agreement by disciplining those employees who had violated specific provisions of such agreement. The employer's action in both cases was for the purpose

[5] *See The Radio Officers' Union of the Commercial Telegraphers Union v. N.L.R.B.,* 347 U.S. 17 (1954).

of encouraging the process of collective bargaining as well as the goal of peaceful labor-management relations, an object which my colleagues would surely agree is not prohibited by Section 8(a)(3) of the Act.

The practical effect of the majority's opinion is quite disturbing, to say the least. According to the majority's analysis, an employee who becomes a union steward acquires a battery of *benefits* and *protections* without an iota of *burdens or responsibilities* in return. For I am certain that my colleagues would not question the accepted principle that union stewards who are engaged in the processing of grievances may engage in conduct which otherwise would be unprotected by the Act.[6] Nor would they dispute the principle that the maintenance and enforcement of a clause in a collective-bargaining agreement granting union stewards superseniority for the purposes of layoff and recall over the rest of the employees in the bargaining unit is lawful.[7] Such benefits or protections are granted *solely* because of the employee's position in the union and for the purpose of properly administering the collective-bargaining agreement. However, when a union steward is disciplined because he has improperly administered the collective-bargaining agreement by failing to fulfill a *duty* inherent in his position and which would not exist *but for* his union position, my colleagues are quick to find a violation on the part of the employer.

The majority's rationale is clearly inconsistent and illogical on its face. In addition, their conclusion that union stewards are under no affirmative duty to enforce a no-strike clause of a collective-bargaining agreement completely ignores the crucial significance of the grievance-arbitration procedure and its companion no-strike clause to the proper administration of the collective-bargaining agreement, as mandated by Congress in the National Labor Relations Act, as applied by the courts and the Board, and as consis-

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[6] *Crown Central Petroleum Corporation*, 177 NLRB 322 (1969); *Thor Power Tool Company*, 148 NLRB 1379 (1964).

[7] *Auto Warehousers, Inc.*, 227 NLRB 628 (1976); *Dairylea Cooperative Inc.*, 219 NLRB 656 (1975).

tently interpreted by a long line of arbitral authority.

The grievance-arbitration, no-strike trade-off received its initial impetus from Congress in Sections 201(c) and 203(d) of the National Labor Relations Act, as amended. In those sections, Congress encouraged the "final adjustment by a method agreed upon by the parties . . . to be the desirable method for settlement of grievance disputes arising over the application of an existing collective-bargaining agreement." [8] The Supreme Court has acknowledged this mandate from Congress in its interpretation and application of Section 301 of the Act. In *Textile Workers Union of America, AFL-CIO* v. *Lincoln Mills of Alabama,*[9] the Supreme Court held that grievance-arbitration agreements are enforceable in Federal courts under Section 301 of the Act. The Court in *Lincoln Mills* recognized that "the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike," relying heavily on the legislative history behind the congressional enactment of Section 301 that:

> If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of an agreement does not by itself promote industrial peace. The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract.[10]

The Supreme Court reaffirmed the crucial importance of the grievance-arbitration, no-strike trade-off

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[8] National Labor Relations Act, as amended, Sec. 201(c). *See Fishman & Brown, Union Responsiblity for Wildcat Strikes,* 21 Wayne L. Rev. 1017 (1975).

[9] 353 U.S. 448 (1957).

[10] *Id.* at 454.

in the *Steelworkers Trilogy,*[11] stating that, to completely effectuate the Federal policy of promoting industrial peace, the collective-bargaining agreement should contain "both an arbitration provision for all unresolved grievances and an absolute prohibition of strikes, the arbitration agreement being the *'quid pro quo'* for the agreement not to strike."[12]

Today, the enforceability of the grievance-arbitration clause against the employer and the no-strike clause against the union are firmly established under Federal law. Thus, when an employer is confronted by a work stoppage which violates a contractual no-strike provision of a collective-bargaining agreement, it has a number of legal avenues to pursue. In order to get the employees back to work as quickly as possible, the employer may seek an injunction under Section 301 of the Act. If it is possible to determine the extent to which the employer has been damaged monetarily by the work stoppage, the employer may sue the union for such damages under the same section. However, if the work stoppage is clearly unauthorized by the union, as in the instant case, and the union has done everything in its power to end the work stoppage, the employer's remedies are much more limited. In such a case, the employer's ability to discipline those employees who participated in the illegal work stoppage is of paramount importance. The Seventh Circuit Court of Appeals recognized this in *Sinclair Oil Corporation* v. *Oil, Chemical and Atomic Workers International Union,*[13] in which it held that union members who breach the no-strike clause of a collective-bargaining agreement in defiance of their union leaders are not individually liable for damages under Section 301 of the Act. According to the court,

> If there is one principle that is universally recognized in the field of industrial relations, it is that shop stewards have the highest duty to

[11] *United Steelworker v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

[12] *United Steelworkers v. Warrior & Gulf Navigation Co., supra,* at 578, fn. 4.

[13] 452 F.2d 49 (1971).

> Congress, in the debates over Section 301, explictly considered the problem of wildcat strikes and possible remedies. The remedies suggested were discharge and discipline. There is no indication that Congress considered Section 301 itself a remedy for an aggrieved employer. . . . We consider that the primary remedy of Sinclair is discharge or discipline of individual defendants.[14]

Thus, the court in *Sinclair Oil* recognized that the primary remedy of an employer when confronted by an unauthorized, illegal work stoppage is the discipline of individual employees who participated in the strike. However, since it is unreasonable to expect or require an employer to discharge or discipline every employee who participated in an illegal strike, a long line of arbitration decisions has established that an employer may selectively discharge wildcat strikers, especially the leaders of such strikes.[15] In affirming the employer's right to selectively discharge strike leaders, arbitrators have characterized the duty of the union steward to prevent or terminate illegal work stoppages in the following manner:

> faithfully adhere to all of the provisions of the collective bargaining agreement and to actively instruct each employee to do so as well. While it is improper for an ordinary employee to deliberately breach the Agreement, a similar act by a shop steward is untenable and grounds for his discharge. It is the obligation of the steward to set an example for all Union members within his jurisdiction by demonstrating his loyalty to the

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[14] *Id.* at 54.

[15] *Litton Systems, Inc.*, 71-1 ARB #8215 (1971) (Abernethy, Arb.); *McGough Bakeries Corporation*, 68-1 ARB #8264 (1967) (Eyraud, Arb.); *Barbetta Restaurant*, 42 L.A. 951 (1964) (Wolff, Arb.); *General American Transportation Corp.*, 42 LA 142 (1964) (Pollack, Arb.). *See* Spelfogel, *Wildcat Strikes and Minority Concerted Activity—Discipline, Damage Suits and Injunctions*, 24 Lab.L.J. 592, 608 (1973); Unkovic, *Enforcing the No-Strike Clause*, 21 Lab.L.J. 387 (1970); Handsaker, *Arbitration and Discipline for Wildcat Strikes*, 14 Lab.L.J. 395 (1963).

> terms and conditions of the contract negotiated by his Union with the Employer. . . . [A] shop steward's duty in the face of an unauthorized work stoppage is well settled. Not only should he make a determined effort to prevent the stoppage before it begins, but upon its development [he] must actively and unequivocally attempt to bring an end of the stoppage at the earliest possible moment.[16]

Although the Board is clearly not bound by such arbitral authority, we would be ignoring the teachings of the Supreme Court in the *Trilogy* were we to disregard the "common law of the shop" that union stewards have affirmative duties under the collective-bargaining agreement, and that they may be discharged for failing to fulfill such duties. I can see no reason why duties which are consistently recognized by the interpreters of the collective-bargaining agreement should not also be recognized by the Board in its interpretation of the National Labor Relations Act.

In fact, in a series of cases going as far back as 1949, the Board has taken the position that union stewards have a greater duty than rank-and-file employees to uphold the provisions of a collective-bargaining agreement, especially the no-strike clause of such an agreement.[17] The Board has also held on several occasions that "[a]n employee who attempts to persuade fellow employees to strike in violation of a contractual no-strike clause or commit acts of insubordination is not insulated from discipline by the mere fact of his holding union office."[18] And in a

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[16] *United Parcel Service, Inc.*, 47 LA 1100-01 (1966) (Schmertz, Arb.).

[17] *Riviera Manufacturing Co.*, 167 NLRB 772 (1967); *University Overland Express, Inc.*, 129 NLRB 82 (1960); *Stockham Pipe Fittings Company*, 84 NLRB 629 (1949).

[18] *Stop & Shop, Inc.*, 161 NLRB 75, 79 (1966); *See Super Valu Exenia*, 228 NLRB 1254 (1977); *Anaconda Aluminum Company*, 197 NLRB 336 (1972); *J.P. Wetherby Construction Corp.*, 182 NLRB 690 (1970); *A. Borchman and Sons Co.*, 174 NLRB 203 (1969); *Russell Packing Company*, 133 NLRB 194 (1961).

very recent decision issued by the same panel as that in ***Precision Castings Company*** (Chairman Fanning and Members Jenkins and Murphy), the Board adopted an Administrative Law Judge's Decision in which a union steward was found to have been lawfully discharged for his participation in an unauthorized, illegal work stoppage because the union steward's active participation made him the natural leader of the work stoppage and thus justified his discharge.[19]

In cases in which the Board has found *unlawful* the discharge of a union steward who had been involved in an illegal work stoppage, it was specifically found that: (1) the steward did *not* participate in the strike; [20] (2) the steward had no contractual duty to prevent the strike or bring it to an end; [21] or (3) the steward had in fact fulfilled his contractual duty to prevent the strike or to get the employees back to work.[22]

In the instant case, the collective-bargaining agreement places a number of affirmative duties on the union steward in the event of an unauthorized, illegal work stoppage. The steward is required to order the employees back to work, to refuse to aid or assist the employees, and to use every effort to bring the stoppage of work to a conclusion. Yet, when the employees refused to work on October 13, Moran stood next to Foreman Scott in front of the assembled employees and stated that "we aren't going back to work until we find out what's going to happen [on the expediting grievance.]" In addition, Moran specifically refused a request by Scott to return to work. The work stoppage lasted for 2 hours and did not end until two other union representatives interceded, further indicating that Moran did nothing to bring the

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[19] *Chrysler Corporation, Dodge Truck Plant*, 232 NLRB 466 (1977).

[20] *General Motors Corporation*, 218 NLRB 472 (1975); *Pontiac Motors Division, General Motors Corporation*, 132 NLRB 413 (1961).

[21] *Morris-Knudsen Company, Inc.*, 210 NLRB 174 (1974).

[22] *Wagoner Transportation Company*, 177 NLRB 452 (1969).

work stoppage to a conclusion. Thus, the record is clear that Moran willfully failed to fulfill the three specific duties required of a union steward in the event of a work stoppage. As a result, Respondent lawfully discharged Moran pursuant to article XVI of the collective-bargaining agreement, and thus did not violate Section 8(a)(3) of the Act.

In addition to their finding that Respondent violated Section 8(a)(3) of the Act by discharging Moran, my colleagues of the majority have adopted the Administrative Law Judge's finding and conclusion that Respondent violated Section 8(a)(4) of the Act as well. The Administrative Law Judge based his finding on a "Progress Report," completed by Respondent at the time of Moran's discharge, in which it is stated that "as a result of Mr. Moran's actions in this case, and in light of Mr. Moran's past activities as an employee and a Shop Steward which indicate repeated violations of the collective bargaining agreement, other Agreements and Company policy, Mr. Moran will be discharged effective October 21, 1976." Since there is absolutely no mention of Moran's having filed charges with the EEOC, OSHA, and NLRB in the "Progress Report," I am at a loss to understand the Administrative Law Judge's conclusion that Respondent violated Section 8(a)(4) of the Act. The only conceivable explanation is that the Administrative Law Judge incorporated the February 18 letter into the "Progress Report" in order to reach the conclusion that Respondent relied in part on the filing of charges by Moran when it discharged him following the work stoppage. Although such a conclusion is rather strained, to say the least, it is completely contradicted by the following facts.

The February 18 letter was sent by Respondent to the Union in order to complain about repeated violations of the collective-bargaining agreement by Moran. Respondent cited five specific instances in which Moran's "actions as a shop steward were entirely inappropriate, if not in absolute violation of the collective bargaining agreement." The only time that the February 18 letter was brought up in regard to the discharge of Moran was during the fourth-step grievance meeting. At that meeting, the Union requested that Respondent reduce or mitigate the discharge of

Moran. Respondent refused, citing Moran's previous involvement in an illegal work stoppage in 1973 and the verbal warning he was given that a recurrence of such conduct could result in his discharge. Since the February 18 letter was the only written record of the 1973 work stoppage, Respondent read that portion of the letter referring to the 1973 incident. The *Union* then requested that the entire letter be read and that they be given a copy, because they were not sure they had it in their files. It is clear that Respondent relied on Moran's having filed charges with the EEOC, OSHA, and NLRB neither when it originally discharged Moran nor when it refused to reduce his discharge. Rather, Respondent discharged Moran in October 1976 for violating the no-strike provisions of the collective-bargaining agreement and, when asked to reduce the discharge, it cited a previous violation of the contractual no-strike provision by the very same employee. The fact that the progress report issued at the time of Moran's discharge mentioned Moran's repeated violations of the collective-bargaining agreement is entirely consistent with Respondent's rationale in discharging him: namely, that Moran had continually refused for a period of over 3 years to abide by his duties as a shop steward under the collective-bargaining agreement; that the Union had repeatedly been warned of Moran's conduct; and that such conduct had been repeated by Moran when he participated in the October 13 work stoppage. Therefore, I cannot agree with my colleagues that Respondent was motivated to discharge Moran by his having filed charges with the EEOC, OSHA, and NLRB, in violation of Section 8(a)(4) of the Act.

To summarize, my colleagues of the majority have reached a decision today which contravenes the directions of Congress, the courts, prior Board decisions, and the consistent arbitral interpretation of the collective-bargaining agreement. In support of its position, the majority has taken an erroneous view of the facts and has engaged in an incorrect application of the law. As a result, the majority has endangered the very foundation of our collective-bargaining system. As noted above, no single factor contributes more to peaceful labor-management relations than the grievance-arbitration system with its companion

no-strike clause. Yet employers are being told today that, in return for their promise to submit all disputes arising under their collective-bargaining agreements to the grievance-arbitration procedure, they are getting absolutely nothing in return. For if union stewards are permitted to engage in unauthorized, illegal work stoppages and not be subject to discipline for failing to comply with their affirmative contractual duties to end such stoppages, the no-strike provision is essentially a nullity as far as the employer is concerned. Not only will industrial peace at the workplace be threatened by the specter of wildcat strikes, but the negotiation of collective-bargaining agreements will also be severely hindered as employers become less willing to concede grievance-arbitration clauses when they know that they will be getting very little in return.[23]

As a practical matter, not only will employers be adversely affected by the majority decision in the instant case and in *Precision Castings,* but unions will suffer as well. Any responsible union has a vested interest in seeing that its agreement with an employer is enforced. The most important individual to police the enforcement of the collective-bargaining agreement is the one who sees the agreement in action every single day; namely, the steward. If the steward is told that he may ignore the plain terms of the agreement and not suffer the consequences, then the efforts of any union to enforce its agreement will clearly be impeded. Since wildcat strikes are as anathema to unions as they are to employers, it is

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[23] The majority's statement that "[E]mployer self-help against individual union officials for a union's breach of contract can only undermine the peaceful settling of disputes and clears the path for employer intervention in a union's internal affairs" further indicates their complete misunderstanding of the instant case. It is precisely because the Union did not violate the contract, leaving Respondent remediless against the Union, combined with the Union's demonstrated unwillingness to take any internal action against Moran, which forced Respondent to take the only reasonable alternative of discharging him. To have permitted Moran to continue as an employee occupying the position of shop steward, despite his open defiance of Respondent, the Union, and the collective-bargaining agreement, would have had a far more disruptive effect on the stability of the collective-bargaining relationship and on the "peaceful settling of disputes" than did the actual discharge of Moran.

logical to assume that unions would be adverse to rulings which provide their stewards with a free hand to lead such wildcat strikes.

In my view, nothing is more repugnant to the purposes and policies of the National Labor Relations Act than to see the sincere efforts of management and labor, in seeking a peaceful resolution of their disputes, wasted because of the unwillingness of employee representatives to assume the burdens which go hand-in-hand with the benefits of union representation. When management and labor are forced to settle their disputes through disruptions at the workplace rather than through the orderly process of collective bargaining, we clearly fail in the goals declared by Congress when it enacted the National Labor Relations Act 43 years ago.

I vigorously dissent.

DECISION

Statement of the Case

Ralph Winkler, Administrative Law Judge: Upon a charge, a complaint issued by the General Counsel on April 20, 1977, and an answer filed by Respondent, a hearing was held in Philadelphia, Pennsylvania, on June 13–14, 1977.

Upon the entire record in the case, including my observation of demeanor of witnesses and consideration of briefs, I make the following:

Findings of Fact

I. THE BUSINESS OF RESPONDENT

Respondent Gould Corporation is a Delaware corporation engaged in the manufacture of electrical circuit breakers in Philadelphia, Pennsylvania. It is an employer within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Local 1612, United Automobile, Aerospace and Agricultural Implement Workers of America (the Union), is a labor organization within Section 2(5) of the Act.

Decision

III. THE UNFAIR LABOR PRACTICES

This case involves the discharge of James Moran on October 21, 1976, and the General Counsel alleges that Respondent has thereby violated Section 8(a)(1), (3), and (4) of the Act. Moran had been with Respondent since 1968 and at the time of his discharge he was employed on the B shift (4 p.m.–12:30 a.m.) on the third floor of M Building. Respondent, apparently, has had a long collective-bargaining history with the Union. Moran was elected a union shop steward in 1971 and at material times here he and Richard Jones were the only stewards on the B shift, Moran representing employees on the first and third floors and Jones representing fourth floor employees.

There are some 40–50 employees on the third floor, and these employees are paid on a bonus system. They receive jobs at the time cage on that floor and work against a time standard. If they complete an assignment more quickly than in the time allotted, they earn bonus pay. There are no official break periods and employees take their breaks at any time, usually in the vicinity of vending machines near the time cage.

Moran's immediate supervisor was Foreman Roger Scott. Thomas Kenny is also a foreman on the third floor, and John Dallmer is general foreman for the entire B shift. Jeffery Panciera is director of industrial relations for this division; his superior is Harold Strack, manufacturing manager. Strack is the management official whose decision it was to terminate Moran. Other union representatives in this case are Shop Chairman James Brennan and Frank Hannings, the chairman of the union negotiating committee. Frank Redmiles is the local union president.

Article XVI of the operative contract between Respondent and the Union provides in part as follows:

> SECTION 1. . . . the Union agrees that it shall not call, sanction, or engage in any strike, slowdown or stoppage of work; . . . .
>
> SECTION 2. Any employee or employees, either individually or collectively who shall cause or take part in any illegal unauthorized or uncondoned strike, work stoppage, interruption or impeding of work during the life of this Agreement, may be disciplined or discharged by the Company.
>
> SECTION 3. In the event of an illegal, unauthorized or uncondoned strike, work stoppage, interruption or impeding of work, the Local and International Union and its officers shall immediately take positive and evident steps to have those involved cease such activity. These steps shall involve the following:

Decision

> The Union, its officers and representatives shall immediately order its members to return to work, notwithstanding the existence of any wild-cat picket line.
>
> The Union, its officers and representatives shall refuse to aid or assist in any way such unauthorized action.
>
> The Union, its officers and representatives, will in good faith, use every reasonable effort to terminate such unauthorized action.

Respondent contends that Moran participated in a work stoppage in violation of this contract and that it discharged him for such reason. The General Counsel urges, on the other hand, that there was no work stoppage and that Moran did not participate in a stoppage even if there was one. The General Counsel further asserts that Respondent in any event discharged Moran at least in part for filing charges or complaints with the NLRB and with EEOC (Equal Employment Opportunity Commission) and OSHA (Occupational Safety and Health Administration).

In 1974, by appendixes to their existing contract, Respondent and the Union agreed to establish and thereupon did set up a Joint Occupational Safety and Health Committee and a Fair Employment Practice Committee as an internal contract mechanism for handling OSHA and EEOC-type disputes. Moran, in his steward capacity, nevertheless did thereafter complain to OSHA and file charges for employees with EEOC. He also filed a charge with the NLRB concerning his own layoff in 1975, which charge the Regional Director found to be meritless. By letter in February 1976, Panciera of Industrial Relations advised Union President Redmiles that Moran had "repeatedly violate[d] the procedures established for resolving disputes" and Panciera mentioned in this connection that Moran had taken the OSHA, EEOC, and NLRB actions without using or exhausting the parties' agreed-upon procedures for resolving disputes, and also that Moran had been purportedly warned in 1973 for his conduct as a steward in connection with a work stoppage at that time. The letter further recited, in part, that Moran's mentioned resort to OSHA, EEOC, and NLRB "represents a violation of the philosophy and intent of the parties and quite possibly an absolute violation of the collective-bargaining agreement. It is important to note that the Company's objection to these actions is based on the fact that Mr. Moran is a shop steward and, as such, is particularly bound to administer the collective-bargaining agreement and policies of the parties in a manner prescribed by the parties. His rights to take such individual actions, as an employee, are not in question."

Decision

A. *Events Concerning the Discharge*

Moran had filed a grievance concerning the performance of alleged contract-unit work (expediting) by a supervisor. Under the contract grievance procedure Respondent had a prescribed time within which to file its response. The period for response was extended, and no claim is made by the General Counsel that Respondent was delinquent so far as the timeliness of its response is concerned. Employees were restive about the grievance, and without waiting for management's response, a substantial number of third floor employees engaged in a work stoppage and congregated in the timeclock area [1] from approximately 4 to 6 p.m. on October 13, 1976. The stoppage ended through the intercession of Union Representatives Brennan and Hannings and after they had obtained a commitment that foremen would not perform the disputed expediting function.

Although Moran denied having participated in or having abetted the work stoppage, the credible testimony of Foreman Scott establishes Moran's role in that activity. In his first encounter with Moran during that period, Scott asked Moran to return to his work area and told Moran that "I [Scott] thought that [as shop steward] it was as much his responsibility as mine to help get these people back to work and if he returned to his work area that maybe the thing would break up and I could address myself to the problem." Moran, who was having coffee at the time, replied that "I'm not going back to work until we get an expeditor." When Scott shortly asked Foreman Kenny to tell his men to return to work, Moran told Scott that the employees were entitled to assemble under Federal law and that Scott had no "right" to tell the employees to go back to work. Scott then exhorted a group of employees to return to work and Moran then declared within the group's hearing, that he was taking his coffeebreak and the others were entitled to do the same thing and that "we ain't going back to work until we find out what's going to happen [on the "expediting" grievance]." Scott testified that Moran was

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[1] Based on the trustworthy testimony of Foreman Scott as well as the testimony on cross-examination of Shop Steward Richard Jones that "there wasn't much question" that a work stoppage had occurred and a prior statement by another General Counsel witness that "during the B shift. . . a large group of workers. . . stopped for 2 hours, protesting doing unit work." Needless to say, I have considered and evaluated the testimony of all witnesses on this and all other factual matters.

the single employee whom he engaged in conversation during the period in question, and he explained that he did so because of Moran's stewardship and that Moran was the person to whom he would normally speak concerning the stoppage situation. The record, however, does not establish that Moran either called or led the stoppage.

Respondent conducted an investigation of the October 13 stoppage, and Panciera recommended to Manufacturing Manager Strack that Moran be fired. Strack concurred with Panciera's recommendation and directed Moran's discharge. Moran was accordingly notified on October 19 that he was terminated, "effective October 21," for "Violation of Article XVI of the Collective-Bargaining Agreement." Strack testified that he alone made the decision to discharge Moran and that he did so after consulting with Panciera and Shop Superintendent Woods. He further testified that Moran's purported warning respecting a 1973 work stoppage and Moran's complaints and filings with OSHA, EEOC, and NLRB played no part in the discharge decision and he denied having even been aware at the time of these other actions by Moran. In this connection Strack also testified he had been unaware of the February 1976 letter from Panciera to Redmiles which, as indicated above, dealt with Moran's conduct as a shop steward in circumventing the parties' internal disputes procedures and in regard to a 1973 stoppage.

Strack testified that upon deciding to discharge Moran, he directed Superintendent Woods to prepare the necessary papers. Woods and Scott contemporaneously signed an internal progress report concerning Moran which reads in part as follows:

> In view of his actions and statements made to Company Representatives that evening, it is clear to the Company that Mr. Moran has violated the provisions of Article XVI of the Collective Bargaining Agreement. As a Shop Steward, Mr. Moran has a particular obligation to observe the provisions of the Collective Bargaining Agreement. As a result of Mr. Moran's actions in this case, and in light of Mr. Moran's past action as an employee and a Shop Steward which indicate repeated violations of the Collective Bargaining Agreement, other Agreements & Company policy, Mr. Moran will be discharged effective October 21, 1976.

Panciera testified that he did not know who had drafted the progress report and was not "sure" he had reviewed or assisted in the drafting, although he testified he might have done so.

Decision

The Union filed a grievance respecting Moran's October 21 discharge, and a fourth-step grievance meeting was held on October 25, 1976. Panciera testified that at this session the union representatives inquired whether Respondent would "downgrade" or lessen Moran's discharge and that he, Panciera, refused to do so because of Moran's participation as a steward in the 1973 stoppage. According to Panciera, he thereupon referred to the aforementioned February 1976 letter and then read the entire letter to the union representatives. Panciera testified that he referred to the letter only in connection with the Union's mitigation request and that the matters involved in this letter did not contribute to Respondent's decision to terminate Moran.

Both Respondent and the Union took notes at the grievance meeting of October 25. The Union's notes state, in part:

> Jeff Panciera, We feel after review Mr. Moran did take part in work stoppage and was in violation of Article 16 we stand on the discharge.
>
> Frank Redmiles, We put people back to work and did our job under contract. will you offer discipline.
>
> Jeff Panciera, None at all. Discharge is sustained.
>
> Frank Redmiles, on basis of your evidence? Don't jack pot us give all evidence.
>
> Jeff Panciera, We stated the essence of the case, his (Moran) actions his previous record, his constantly going out of grievance procedure, in 1973 he caused a work stoppage, he was warned the next time he would be discharged. February of this year I sent you a letter stating Mr. Moran's constant going outside facilities instead of the grievance procedure. We have been involved with Moran's abuse of the grievance procedure. (Placement grievance) he put grievance in 1st step Placement grievance have always been automatic 3rd step grievance. May 1975 Moran while grievance was in process he filed charges with E.E.O.C.
>
> August 75–Moran while grievance was in process filed charges with the N.L.R.B. against Company.
> February 76–letter sent advising Union continual violation by Moran going out of contract agreement.
> Mr. Moran's behavior distruction of Company property has a propensity to violation of the collective bargaining agreement.

Respondent's minutes were contained in a letter it sent to the Union on November 8, 1976. These minutes read, in part:

Decision

> After thorough review and discussion, the Company advised the Union that in light of Mr. Moran's actions and statements on the evening of October 13, 1976, which were contrary to the obligations of a Shop Steward and, in view of his past actions as an employee and Shop Steward which indicates repeated violations of the Collective Bargaining Agreement, other agreements, and Company Policy, the Company feels that the discharge in this case was entirely justified. (The Company also outlined Mr. Moran's past violations of the Agreement as a Shop Steward which were discussed in a letter to the Union dated February 18, 1976, copy attached, as well as Mr. Moran's record as an employee.) Therefore, the Company sustained its position and the discharge will stand.

Moran thereafter filed a claim for unemployment compensation with the Bureau of Employment Security. By letter of November 16, 1976, Respondent advised the Bureau, in part, as follows:

> Mr. Moran was discharged by his department supervision on October 21, 1976, for violation of Article XVI of the Collective Bargaining Agreement between the Company and Local 1612, UAW. This Article specifies, in part, the obligations of employees and union representatives regarding work stoppages, and the consequences of causing or participating in such actions.
>
> Mr. Moran was a union representative at the time the action in question occurred, and he did participate in a work stoppage on October 13, 1976, in violation of the provisions of that Article. As a Union representative, he had a clear responsibility under that article, and his failure to fulfill that responsibility resulted in his discharge.

B. *Concluding Findings*

The record preponderantly establishes that Moran and other third floor employees engaged in a work stoppage on October 13.[2] This violation of the no-strike contract is generally unprotected conduct and Respondent asserts that it was therefore entitled, without liability, to "pick and choose" in disciplining employees for participating in the misconduct. But this "freedom to discipline anyone re-

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[2] However, *see United Merchants and Manufactures, Inc. v. N.L.R.B.*, 554 F.2d 1276 (C.A. 4, 1977).

mained unfettered [only] so long as the criteria employed were not union-related." *Precision Castings Company*, 233 NLRB 183 (1977).

In the *Precision Castings* case, five union stewards joined in an unauthorized strike in breach of a valid contract provision. The employer disciplined the stewards, but no other strikers, the admitted reason for their selection being their shop steward position and their failure to urge the other strikers to give up the strike. Noting that "under the terms of the contract" the stewards "could assertedly be held to a greater degree of accountability for participating in the strike," the Board concluded that the discipline given them was nevertheless violative of the Act. The Board thus explained that "discrimination directed against an employee on the basis of his . . . holding union office is contrary to the plain meaning of Section 8(a)(3) and would frustrate the policies of the Act if allowed to stand."

Shop Steward Moran also had a greater degree of responsibility under the instant contract, and Respondent acknowledged to the Bureau of Unemployment and I find that he was selected for discharge because he willfully failed the responsibility of his union position. Under *Precision Castings*, this basis for discipline is itself unlawfully discriminatory. The record establishes, moreover, that discharge decision. Thus, Respondent's own progress report plainly shows and I find that Respondent's decision to discharge Moran was affected or motivated, in part, by the fact that Moran had filed charges with or complained to EEOC and OSHA,[3] and also because he had filed a charge with the NLRB.[4]

Conclusions of Law

1. Respondent is an employer within Section 2(6) and (7) of the Act.
2. The Union is a labor organization within Section 2(5) of the Act.
3. By discharging Moran, Respondent has violated Section 8(a)(1), (3), and (4) of the Act.
4. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

---

[3] *Air Surrey Corporation*, 229 NLRB 1064 (1977); *Wray Electric Contracting, Inc.*, 210 NLRB 757 (1974); *Alleluia Cushion Co., Inc.*, 221 NLRB 999 (1975); *King Soopers, Inc.*, 222 NLRB 1011 (1976); *Advance Carbon Products, Inc.*, 198 NLRB 741 (1972).

[4] *General Services, Inc.*, 229 NLRB 940 (1977); *The Howard P. Foley Company*, 229 NLRB 1167 (1977); *Globe Manufacturing Company*, 229 NLRB 1025 (1977).

Decision

THE REMEDY

Having found that Respondent has engaged in unfair labor practices violative of Section 8(a)(1), (3), and (4) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action, including reinstating Moran and making him whole, in order to effectuate the policies of the Act. All backpay computations shall be in accordance with *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977). (See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).)

Upon the foregoing findings, conclusions, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER [5]

The Respondent, Gould Corporation, Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against employees because they are union stewards or other union representatives or for filing charges or complaints with NLRB, OSHA, or EEOC.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights as guaranteed by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer James P. Moran reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole, as set forth in "The Remedy" section, above, for any loss of earnings suffered as a result of the discrimination against him.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records neces-

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[5] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and the recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

sary to analyze the amount of backpay due and the right of reinstatement under the terms of this Order.

(c) Post at its M Street plant in Philadelphia, Pennsylvania, the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 4 of the Board, after being duly signed by Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 4, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT discharge or otherwise discriminate against employees because they are shop stewards or other union representatives or for filing charges or lodging complaints with NLRB, OSHA, or EEOC.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their right to engage in protected concerted activities, and other rights under the Act.

WE WILL reinstate and make whole James P. Moran for loss of earnings since his discharge, with interest.

---

[6] In the event that this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Supreme Court, U.S.
FILED
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No. 79-1946

IN THE

Supreme Court of the United States

October Term, 1979

JAMES MORAN,

Petitioner,

v.

GOULD INCORPORATED and the
NATIONAL LABOR RELATIONS BOARD,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT GOULD INCORPORATED IN OPPOSITION

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OCTOBER TERM, 1979

JAMES MORAN,

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v.

GOULD INCORPORATED and the NATIONAL LABOR RELATIONS BOARD,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT GOULD INCORPORATED IN OPPOSITION

QUESTION PRESENTED

Was there a reasonable basis for the Court of Appeals to conclude that Petitioner's discharge did not violate Section 8(a)(4) of the National Labor Relations Act?

STATEMENT OF THE CASE

James Moran, the petitioner in this case, was discharged by Respondent Gould Incorporated ("Gould" or "the Company") on October 18, 1976 for his leadership of and participation in a wildcat work stoppage in violation of a valid no-strike clause in his union's contract with Gould. Moran was the union shop steward on his shift, and on October 13, 1976, he led approximately 50 employees in a two-hour stoppage of work. Contrary to the suggestion in the Petition for Certiorari, there was no doubt in any of the tribunals below that the strike violated the no-strike clause of his contract[1] or that Moran participated in it.[2] Indeed, the question of Moran's active participation in and encouragement of the work stoppage was the subject of sharply conflicting testimony below. The Administrative Law Judge ("ALJ") found the testimony of Company personnel on these matters "trustworthy" and explicitly rejected Moran's contrary testimony (and the factual scenario set forth in the Petition for Certiorari). The Board adopted the ALJ's findings.

As the union shop steward, Moran had specific obligations under the contract to take action to halt any

1. The dispute underlying the stoppage had been submitted to the grievance process. Moran led the employees in a wildcat strike without waiting for the Company's answer, which was not yet due under the grievance system.

2. The Administrative Law Judge, the Board, and the Court of Appeals so found. In fact, Gould contended on appeal that the record compelled the conclusion that Moran not only participated in but led the work stoppage. The Company's testimony, which was credited over Moran's by the Administrative Law Judge, demonstrated that Moran stood at his foreman's side and exhorted the employees to continue the stoppage while his foreman entreated the strikers to return to work. Two members of the National Labor Relations Board agreed with this conclusion. The Court of Appeals did not reach the issue.

wildcat strikes. He disregarded these obligations as well as his obligations under the no-strike clause when he actively participated in the stoppage. Nonetheless, the Board held that Gould violated Section 8(a)(3) of the National Labor Relations Act, 29 U. S. C. § 158(a)(3), in discharging Moran for his actions in connection with that work stoppage. Specifically, the ALJ, whose finding the Board adopted, wrote:

> "I find that [Moran] was selected for discharge because he willfully failed the responsibility of his union position [in connection with the stoppage] . . . ."

It was this finding and the Board's ruling as to its legal effect which was the main thrust of the decisions below.

With its decision in this case, the Third Circuit Court of Appeals joined the Seventh Circuit in rejecting the Board's notion (which ran contrary to years of Board and arbitrators' decisions) that it violates the National Labor Relations Act to single out for discharge a shop steward who violates a no-strike clause. *Neither Moran nor the NLRB has sought review of that decision.* This Petition for Certiorari is instead founded on an afterthought of the ALJ and the Board. In the final sentence of his opinion, the ALJ added that the decision to discharge Moran had been "affected or motivated, in part, by the fact that he filed charges with, or complained to EEOC and OSHA, and also because he had filed a charge with the NLRB." Accordingly, the ALJ concluded that Gould had violated § 8(a)(4) of the National Labor Relations Act, § 29 U. S. C. § 158(a)(4), which forbids discharge in retaliation for filing charges under the National Labor Relations Act.

The Court of Appeals reviewed the extensive record before it and concluded that substantial evidence on the

record as a whole did not support a violation of § 8(a)(4). Indeed, it as well as the Board itself found that Moran was discharged because he violated his responsibilities under his contract in connection with the wildcat strike. The additional, implicitly contradictory conclusion by the Board referred to charges which Moran had filed well over a year before the strike and his discharge.

The stated basis for the ALJ's conclusion that Gould had fired Moran as retaliation was an internal Company "Progress Report" written at the time of the discharge. But neither the Progress Report nor any of the internal documents prepared in connection with the discharge contained any mention of Moran's previous filing of charges. The only reference ever made by the Company to those previous charges had been in a letter written by Gould to the union in February of 1976, over seven months before the strike and Moran's discharge. From the record, it is clear that the letter and the charges had no part in the decision to discharge Moran, and in concluding the contrary, the Board ignored the *uncontradicted* evidence in the record as to how the letter came to be mentioned at all at the fourth step of the grievance procedure.

The Third Circuit reviewed all the evidence and the credibility determinations (none of which was resolved against the Company), and reversed the conclusion of the Board, stating: "From our review of the entire record we conclude that there is no substantial evidence to support a finding that Moran's discharge was because he had filed charges with EEOC, OSHA, and the Board."

SUMMARY OF ARGUMENT

The Court of Appeals has the primary responsibility for reviewing the record as a whole to determine whether substantial evidence supports the Board's findings. This Court need intervene only in the rare instance where the Court of Appeals misapprehends or grossly misapplies the standard. This is plainly not such a case. Not only did the Board itself find another, non-retaliatory motive as the real reason for the discharge, the entire record clearly demonstrated that retaliation was not the real motive for the discharge.

ARGUMENT

I. The Court of Appeals' Determination Concerning the Existence of Substantial Evidence on the Record as a Whole Should Be Disturbed Only Where the Standard Has Been Misapprehended or Grossly Misapplied.

As originally enacted, the National Labor Relations Act provided that the Board's findings of fact would be conclusive if "supported by evidence." Pub. L. No. 198, § 10(f), 49 Stat. 455 (1935). Intending to provide a more genuinely meaningful review of the Board's findings, the Congress changed the standard in 1947; the relevant section now provides that "the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall . . . be conclusive." 29 U. S. C. § 160(f); Pub. L. No. 101, § 10(f), 61 Stat. 140 (1947). On appeal, a Court of Appeals must examine the record as a whole to determine the validity of the Board's findings. This more stringent standard of review was construed by this Court in *Universal Camera Corp. v. NLRB,* 340 U. S. 474, 488 (1951), when it held:

> [A] reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view.

As Mr. Justice Frankfurter admonished, a court is not to "deem itself merely the judicial echo of the Board's conclusion." *Universal Camera Corp. v. NLRB,* 340 U. S. 474, 491 (1951).

In the *Universal Camera* case, this Court also held that the determination

> [w]hether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Court of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied. 340 U. S. at 491.

That deference to the Court of Appeals' review of the entire record has been repeatedly reaffirmed by this Court. *See, e.g., Golden State Bottling Company v. National Labor Relations Board,* 414 U. S. 168, 172-3 (1973); *Central Hardware Co. v. National Labor Relations Board,* 407 U. S. 539, 548 (1972).[3] As Mr. Justice Brennan wrote in *Golden State,* "This is not the place . . . to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other. . . ." *Golden State, supra,* 414 U. S. at 174, quoting *NLRB v. Pittsburgh Steamship Company,* 340 U. S. 498, 503 (1951).

II. The Court of Appeals Had Ample Basis to Conclude That the Board's Subsidiary Finding Concerning the Cause of Moran's Discharge Was Unsupported by Substantial Evidence.

Even a brief perusal of the circumstances of this case makes it clear that the Court of Appeals correctly found that there was no substantial evidence to support the

3. In *Central Hardware, supra,* cited by Petitioner, no such determination had been made by the Court of Appeals, and the Court remanded the case to the Court of Appeals with the instructions to undertake such a review. On remand, the Court of Appeals determined that there was not substantial evidence to support the Board's findings. 468 F. 2d 252 (8th Cir. 1972).

Board's conclusion that Moran was discharged in retaliation for filing charges. This is hardly that "rare instance" where a Court of Appeals went grossly astray. After all, the entire thrust of the Board's decision was that Moran was discharged *because of his participation in the wildcat strike.*

The Company's position at the time of the discharge was completely consistent—Moran was discharged for violating the no-strike provision of the contract. The many documents created in connection with the decision to discharge and made part of the record below *all* gave the no-strike clause violation as the reason for the discharge. The scenario surrounding the discharge decision was described in detail by the various witnesses for the Company, and was not contradicted at the hearing to any substantial extent. Further, the author of the "Progress Report" described in detail and without contradiction what the language in that report meant. Neither that testimony nor the Progress Report nor any of the documents relating to the discharge referred to the filing of charges by Moran. In short, there was *no* evidence that previous complaints to government agencies had anything to do with the decision to discharge Moran.

The sole basis on which the Petition for Certiorari rests is the February 18, 1976 letter to the Union, which among other things refers to Moran's complaints to government agencies. This letter was referred to in a session with the Union to discuss its grievance over Moran's discharge.

But to connect the contents of the letter with the discharge in any way requires that one ignore not only what the letter says and the obvious lack of connection to the Progress Report on which the Board relied, but also that one ignore the *uncontradicted* testimony as to how the February 18 letter came to be part of the record at all.

The February 18 letter had recounted Moran's participation in a 1973 work stoppage, Moran's repeated filing of placement grievances at the wrong level in violation of Company policy, and Moran's various complaints to federal agencies. Panciera of Gould testified that during the fourth step grievance meeting the question of mitigation of the discipline was raised, and that Gould responded that it would not because this was the second illegal work stoppage that Moran had been active in and involved with. He read from the February letter regarding the 1973 stoppage because it was the only written record of that stoppage. The reference to the 1973 stoppage was the first item in the letter, and Panciera read only that portion to support the Company's position. The *union* then asked him to read the balance of the letter and to attach it to the minutes. It is important to recognize that Panciera's testimony was uncontradicted in this regard, although union officers who attended the meeting testified at the hearing.

Finally, it is important to understand what the February letter itself did and did not do. The letter did not in any way threaten retaliation for filing such charges, nor was it made part of Moran's personnel file. The Company and the union had previously set up informal contract mechanisms for dealing with equal opportunity and occupational safety and health disputes, in addition to the normal grievance process. The part of the letter referring to those charges was an understandable attempt to ask Moran, who had as a shop steward been ignoring the mechanisms, to avail himself of them. In fact, the letter specifically pointed out that *"His rights to take such individual actions, as an employee, are not in question."*

This Court has long held that when the issue is improper motive for a discharge, it is the "real motive" which is important. *See, e.g., Associated Press v. NLRB,* 301

U. S. 103, 132 (1937); *NLRB v. Brown,* 380 U. S. 278 (1965). Beyond its first finding of motive, the Board inferred another motive of retaliation by an extraordinarily attenuated chain of reasoning. It relied on a recitation to charges made long after the Progress Report which was the stated basis for its finding. That recitation itself arose only because the union asked Gould to read the remainder of a letter written ten months before the discharge. And the letter containing the reference to the charges neither threatened retaliation nor questioned Moran's rights to take such actions as an employee. The real reason for Moran's discharge as found by the Court of Appeals was absolutely clear from the record as a whole: Moran was discharged because he led a wildcat work stoppage on October 13, 1976, and for no other reason.

CONCLUSION.

For all of the above reasons, the Petition for a Writ of Certiorari to the Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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Dated: July 11, 1980.

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No. 79-1946

In the Supreme Court of the United States

OCTOBER TERM, 1979

JAMES MORAN, PETITIONER

v.

GOULD CORPORATION AND
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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Section 8(a)(4), 29 U.S.C. 158(a)(4) 3, 4

In the Supreme Court of the United States

OCTOBER TERM, 1979

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MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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1. Petitioner was a shop steward employed by respondent Gould Corporation. The collective bargaining agreement between Gould and Local 1612, United Automobile, Aerospace and Agricultural Implement Workers of America, contained a no-strike clause that provided for discipline or discharge of employees who struck in violation thereof and required union officials to take positive steps, including ordering the employees back to work, to terminate any unlawful work stoppages. (Pet. Supp. App. 23a-25a.)

On October 13, 1976, a number of employees, disgruntled over a delay in resolving a grievance, stopped work and congregated in the time-clock area. The foreman sought out petitioner, who was having coffee, and asked him to return to his work area. The foreman explained that it was as much the steward's responsibility as the foreman's to help get the employees back to work, and added that the "thing" might break up if the steward returned to his work area. Petitioner replied that he was not going back to work until the grievance was favorably resolved. The foreman then attempted to enlist the aid of a second foreman in getting the men to resume work, but petitioner protested that federal law gave the employees the right to assemble. When the foreman urged the men to return to work, petitioner declared that "we ain't going back to work until we find out what's going to happen [on the grievance]." The work stoppage lasted approximately two hours and ended through the intercession of the union. (Pet. Supp. App. 26a-27a.)

Following an investigation of the strike, respondent Gould Corporation decided to single out petitioner for discharge. It prepared an internal progress report that cited petitioner's failure to comply with his supervisor's instructions "to assist in returning the employees to work and to return to work himself." Subsequently, at a fourth-stage grievance meeting, a union request for lesser discipline was rejected by the company because of petitioner's previous violations of the appropriate procedures for resolving disputes, including participation in a prior unlawful work stoppage and the filing of charges with OSHA, EEOC and the NLRB. (Pet. Supp. App. 27a-29a.)

2. The Board, by a divided vote, found that the discharge of petitioner violated the National Labor Relations Act. It agreed with the administrative law judge

that the "discipline of [petitioner] was based on [his] union status rather than on his conduct as an employee." Relying on *Precision Castings Co.*, 233 N.L.R.B. 183 (1977), where it had found unlawful an employer's sanctions imposed only against the union stewards and not against the other employees who participated in an unauthorized strike, the Board held that the discipline of petitioner violated Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3). The Board also upheld the administrative law judge's conclusion that the discharge of petitioner violated Section 8(a)(4) of the Act, 29 U.S.C. 158(a)(4), since his discharge "was affected or motivated, in part, by the fact that [he] had filed charges with or complained to EEOC and OSHA, and also because he had filed a charge with the NLRB." Finally, the Board entered an order requiring the Company, *inter alia*, to reinstate petitioner with back pay. (Pet. Supp. App. 5a-6a, 29a-31a.)

3. The court of appeals, agreeing with the decision of the Seventh Circuit in *Indiana & Michigan Electric Co.* v. *NLRB*, 599 F. 2d 227 (1979), held that an employer may single out for discipline a union steward who fails "to discharge his contractual obligation as a union officer to take steps to terminate [a] work stoppage" (Pet. App. 3a, 8a).[1] It thus overturned the Board's finding that petitioner was discharged in violation of Section 8(a)(3) of the Act. The court also rejected the Board's determination of a violation under Section 8(a)(4), concluding that the finding of a causal connection between the filing of the charges and the discharge was not supported by substantial evidence. (Pet. App. 9a, 12a, 14a-15a.)

4. Petitioner does not challenge the court of appeals' holding, contrary to that of the Board, that an employer may, without violating Section 8(a)(3) of the Act, single

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[1]The court of appeals' decision is reported at 612 F. 2d 728.

out for discipline a union steward who violates a contractual obligation to take steps to terminate an unlawful work stoppage. Rather, the only issue raised in the petition is whether substantial evidence supports the Board's further finding that petitioner's discharge also violated Section 8(a)(4) of the Act because it was motivated in part by his resort to the Board and other federal agencies.

The Board believes that the court erred in concluding that substantial evidence did not support the finding that petitioner was discharged in part because of his activities in filing charges and complaints with federal agencies.[2] However, the Board did not file its own petition because its disagreement with the court on this point raises only an evidentiary issue that does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951). Should the petition for a writ of certiorari be granted, the Board will defend its Section 8(a)(4) finding and its remedy therefor.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

WILLIAM A. LUBBERS
General Counsel
National Labor Relations Board

AUGUST 1980

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[2]The court's amended decision accepts the legal position of petitioner and the Board that a discharge motivated in part by the employee's protected activity is unlawful notwithstanding the concurrent existence of a valid ground for discharge (Pet. App. 14a-15a).

DOJ-1980-08